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Writ of Error and Order Allowing Same.

UNITED STATES OF AMERICA, SS.:

The President of the United States of America, to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

BECAUSE, in the record and proceedings, as also 2
in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between United States of America, Plaintiff, and Alexander Berkman and Emma Goldman, defendants, a manifest error hath happened, to the great damage of the said defendants, as is said and appears by their complaint, WE, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Su- 3
preme Court, at the Capitol, in Washington, D. C., together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 15th day of February, 1919, that the record and proceedings aforesaid being inspected, the said Judges of the United States Supreme Court may cause further to be done therein, to correct that error.

4 *Writ of Error and Order Allowing Same.*

what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable Edward D. White, Chief Justice of the United States, this 17 day of January, in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-third.

ALEX. GILCHRIST,
Clerk of the District Court of the
5 United States of America for the
Southern District of New York,
in the Second Circuit.

The foregoing writ is hereby allowed.

LEARNED HAND,
U. S. District Judge.

6

Order Denying Motion. 7

At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, at the United States Court House and Post Office Building, Borough of Manhattan, City of New York, this 17th day of January, 1919.

Present:
Hon. LEARNED HAND,
District Judge.

UNITED STATES OF AMERICA, 8
Plaintiff,

against

ALEXANDER BERKMAN and EMMA GOLDMAN,
Defendants.

A motion having been made to direct Alexander Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York, to pay to Harry Weinberger the sum of Eight hundred ($800) Dollars, heretofore deducted by the said Alexander Gilchrist, Jr., from Eighty thousand 9
($80,000) Dollars, cash deposited in lieu of bail on behalf of Emma Goldman and Alexander Berkman, Five hundred ($500) Dollars having been deducted from moneys deposited as bail pending trial and Three hundred ($300) Dollars having been deducted from moneys deposited in lieu of bail pending appeal, and the said motion having come on for

argument before Honorable Learned Hand, United States District Judge,

Now, on reading and filing the affidavit of Harry Weinberger, verified the 18th day of December, 1918, and the notice of motion, dated the 18th day of December, 1918, and after hearing Harry Weinberger, Esq., attorney for the defendants, for the motion, and S. Laurence Miller, Esq., Assistant United States Attorney, for plaintiff, in opposition thereto, it is hereby

ORDERED, that the said motion be and the same hereby is in all respects denied.

11

LEARNED HAND,
U. S. D. J.

Notice of settlement waived.
Order consented to.

S. LAURENCE MILLER,
Asst. U. S. Attorney.

12

Notice of Motion. 13

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

EMMA GOLDMAN and ALEXANDER BERKMAN,
Defendants.

Sir:

PLEASE TAKE NOTICE that on the annexed affidavit of Harry Weinberger, verified the 18th day of December, 1918, and all proceedings had herein, I will move before Honorable Learned Hand, Judge of the United States District Court for the Southern District of New York, on the 20th day of December, 1918, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at room 235, Post Office Building, in the Borough of Manhattan, City of New York, for an order directing the Clerk to pay me Eight hundred ($800) Dollars, deducted by him as fees on $80,000, cash bail deposited for Emma Goldman and Alexander Berkman, and for such other and further relief as to the Court may seem proper. 14 15

Dated, New York, December 18th, 1918.

Yours, etc.,

HARRY WEINBERGER,
Attorney for Defendants,
Office & P. O. Address,
261 Broadway,
Manhattan,
New York City.

16 *Notice of Motion.*

To:
FRANCIS G. CAFFEY, Esq.,
United States Attorney,
Post Office Bldg.,
Manhattan,
New York City.

Affidavit of Harry Weinberger, in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

17

UNITED STATES OF AMERICA,
Plaintiff,

against

EMMA GOLDMAN and ALEXANDER BERKMAN,
Defendants.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

18 HARRY WEINBERGER, being duly sworn, deposes and says:

That on the 15th day of June, 1917, Emma Goldman and Alexander Berkman were arrested in the City of New York.

That on the 21st day of June, 1917, I deposited with the Clerk of the United States District Court, Southern District of New York, $25,000, cash bail

for Emma Goldman, and on the 25th day of June, 1917, I deposited with the said Clerk of the United States District Court, Southern District of New York, $25,000 as bail for Alexander Berkman.

That on the 11th day of July, 1917, Honorable Julius M. Mayer, United States District Judge, ordered that the Clerk of this Court pay out of the Registry of this Court to the person depositing said bail the sum of $15,000 out of the deposit of $25,000 as bail for Emma Goldman, less the Clerk's fees, if any.

That on the 11th day of July, 1917, Honorable Julius M. Mayer, United States District Judge, ordered that the Clerk of this Court pay out of the 20
Registry of this Court to the person depositing said bail the sum of $15,000 out of the deposit of $25,000 as bail for Alexander Berkman, less the Clerk's fees, if any.

That the said Clerk of this Court claimed 1% as his fees.

That thereafter upon an appeal to the United States Supreme Court and an order of Supersedeas, on the 28th day of July, 1917, I deposited with the Clerk of the United States District Court $15,000 as bail for Emma Goldman, and on the 10th day of September, 1917, $15,000 as bail for Alexander Berkman.

That on or about the 6th day of August, 1917, 21
real estate bail was substituted for $15,000 of Emma Goldman's bail, and on the 6th day of August, 1917, I paid the Clerk $150.00, fee claimed by said Clerk of the Court, and on the 5th day of February, 1918, to release $15,000 of the Alexander Berkman bail, I paid the said Clerk's fee of $150.00, and on the 21st day of March, 1918, to release the balance of

$20,000, bail of Berkman and Goldman, I paid to the Clerk $200, 1% clerk's fees.

That on the 10th day of May, 1918, the United States Attorney consented to an order directing Alexander Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York, to pay me the sum of Eight hundred ($800) Dollars, heretofore deducted by the said Alexander Gilchrist, Jr., from $80,000, cash deposited in lieu of bail on behalf of Alexander Berkman and Emma Goldman, and a similar consent was signed by him in the case of United States against William B. Bales, which was on appeal to the United States
23 Supreme Court.

That before said order was signed said United States Attorney withdrew his said consent in this case, and I withdrew my consent, therefore, in the case of United States against William B. Bales, and the appeal to the United States Supreme Court was proceeded with.

On the 28th day of October, 1918, the case of United States against William B. Bales having been reached for argument, the Solicitor-General on behalf of the United States confessed error. The three grounds in my Assignments of Error were: First: That the District Court erred in construing Section 828 of the Revised Statutes of the United States
24 as valid for the Clerk of the United States District Court for the Southern District of New York to deduct one percentum of monies deposited as cash bail for plaintiff in error in a criminal case. Second: In not granting the motion of the plaintiff in error in conformance with the mode of process against defendants in the State of New York as required by United States Revised Statutes 1014.

Third: That it was unconstitutional on various grounds.

That on the 18th day of December, 1918, a mandate from the United States Supreme Court, dated the 28th day of October, 1918, was filed in the United States District Court reversing the order of the 13th day of November, 1917, which denied my motion in the Bales case for the 1% deducted by the Clerk.

That an order on notice making that mandate the order of this Court will this day be served on the District Attorney. That the decision by the United States Supreme Court on the confession of error by the United States is decisive of my right to the return of the 1% deducted on cash deposited as bail before conviction and cash deposited as bail after conviction for release pending appeal.

WHEREFORE, I respectfully ask that the Clerk of this Court be directed to return the sum of Eight hundred ($800) Dollars, paid in as his fee on the $80,000, deposited as bail for Alexander Berkman and Emma Goldman before conviction and after conviction.

HARRY WEINBERGER.

Sworn to before me this
18th day of December, 1918.

JEROME WEISS,
Commissioner of Deeds,
New York City.

28 **Decision of Learned Hand, *D. J.***

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, Plaintiff, against EMMA GOLDMAN and ALEXANDER BERKMAN, Defendants.	C. 9—474.

29

Memorandum by Judge Learned Hand endorsed on affidavit and notice of motion for an order directing the Clerk to pay Harry Weinberger, Attorney for the defendants, $800.00 deducted by the Clerk as fees on $80,000 cash bail deposited for defendants.

This case is controlled by my own decision in U. S. v. Giovanetti, filed July 19, 1918. The decision of the Supreme Court in U. S. v. Bales was upon confession of error by the Solicitor General and motion to reverse. The court did not therefore pass upon the question and there is no ruling contrary to those of Judge A. N. Hand and myself. I cannot, however, agree with the contention of the Clerk
30 that this case differs from Bales' or from Giovanetti. The court upon sentence did not award costs against the defendants which would have been essential. Now it is quite true that in result it is the same as though the court had awarded costs, because the U. S. will get the money. This results from the fact that the United States takes the sur-

plus of the clerk's earnings above certain allowances. Even this, however, would not follow, if the clerk's earnings did not exceed those allowances. In any event I consider the consideration irrelevant, so long as the clerk is regarded as an official paid fixed sums for specific services. This is the point of view of the statute, and while the system obtains I see no other possible result. The event of the prosecution makes a great difference to the defendants in the justice of the result, but it appears to me to make no difference in the statute applicable, nor for that matter even in the justice of the clerk's position if it should so happen that the office did not earn its allowances for the year. Motion denied.

L. HAND.

34 **Order Accepting Cash Bail.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, this 25th day of June, 1917.

Present:
JULIUS M. MAYER,
District Judge.

35 THE UNITED STATES
vs.
EMMA GOLDMAN.

Upon the consent of Francis G. Caffey, United States Attorney for the Southern District of New York, it is hereby

ORDERED, That the sum of 25000 Dollars, cash, be deposited in the Registry of this Court in lieu and place of bail for the appearance of the above-named defendant before the United States District Court for the Southern District of New York, in
36 accordance with the provisions of the recognizance to be given by said defendant Emma Goldman.

J. M. MAYER,
U. S. District Judge.

Order Accepting Cash Bail. 37

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, this 25th day of June, 1917.

Present:
HARLAND B. HOWE,
District Judge.

THE UNITED STATES
v. 38
ALEXANDER BERKMAN.

Upon the consent of Francis G. Caffey, United States Attorney for the Southern District of New York, it is hereby

ORDERED, That the sum of $25000 Dollars, cash, be deposited in the Registry of this Court in lieu and place of bail for the appearance of the above-named defendant before the United States District Court for the Southern District of New York, in accordance with the provisions of the recognizance to be given by said defendant Alexander Berkman.

HARLAND B. HOWE, 39
U. S. District Judge.

Consented to
FRANCIS G. CAFFEY,
U. S. Attorney,

By HAROLD A. CONTENT,
Assistant U. S. Attorney.

Note: Cash deposited by Harry Weinberger of 261 Broadway, New York City.

40 **Order of July 11, 1917, *re* Payment of Cash Bail.**

At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, at the United States Court House and Post Office Building, Borough of Manhattan, City of New York, this 11 day of July, 1917.

Present:
MARTIN T. MANTON,
District Judge.

41

THE UNITED STATES
vs.
EMMA GOLDMAN.

An order having heretofore been made in this case authorizing the Clerk of this Court to accept the sum of 25000 Dollars, cash, and to deposit the same in the registry of this court in lieu and place of bail for the appearance of the above-named defendant before the Honorable Julius M. Mayer, Judge of the United States District Court for the Southern District of New York, in accordance with
42 the provisions of the bond given by the said defendant; and subsequently the said defendant having substituted real estate, it is

ORDERED, That the Clerk of this Court pay out of the registry of this Court to Harry Weinberger, the person depositing the said sum of money, the

sum of $15000, less the Clerk's fees, if any, the balance to be paid on further order of the Court on motion of one day's notice the defendant on final order reserving question of clerk's right to fees.

MARTIN T. MANTON,
U. S. District Judge.

Consented to

U. S. Attorney.
By HAROLD A. CONTENT,
Asst. U. S. Attorney

44

45

46 **Order of July 11, 1917, *re* Payment of Cash Bail.**

At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, at the United States Court House and Post Office Building, Borough of Manhattan, City of New York, this 11th day of July, 1917.

Present:
Hon. JULIUS M. MAYER,
District Judge.

47

THE UNITED STATES
v.
ALEXANDER BERKMAN.

An order having heretofore been made in this case authorizing Clerk of this Court to accept the sum of Twenty-five Thousand 00/100 Dollars, cash, and to deposit the same in the registry of this court in lieu and place of bail for the appearance of the above-named defendant before Hon. Julius M. Mayer, Judge of the United States Dist. Court, in
48 accordance with the provisions of the bond given by the said defendant; and subsequently the said defendant having been convicted and sentenced, IT IS

ORDERED that the Clerk of this Court pay out of the registry of this Court to Harry Weinberger, the person depositing the said Twenty-five Thousand

Dollars, the sum of $15,000, less the Clerk's fees, if any. The balance to be paid on further order of the Court, on motion of one day's notice, the defendant on formal order reserving question of Clerk's right to fee.

JULIUS M. MAYER,
U. S. District Judge.

Consented to:
HAROLD A. CONTENT,
Asst. U. S. Attorney.

Filed Jul. 11, 1917. 50

51

52 **Order of July 28, 1917, *re* Payment of Cash Bail.**

At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, at the United States Court House and Post Office Building, Borough of Manhattan, City of New York, this 28th day of July, 1917.

Present:
Hon. MARTIN T. MANTON,
District Judge.

53

THE UNITED STATES
v.
EMMA GOLDMAN.

An order having heretofore been made in this case authorizing the Clerk of this Court to accept the sum of 25000 Dollars, cash, and to deposit the same in the registry of this court in lieu and place of bail for the appearance of the above-named defendant before the United States District Court for the Southern District of New York, in accordance with
54. the provisions of the bond given by the said defendant; and subsequently the said defendant having been granted a writ of error and ordered released on a supersedeas bond, it is

ORDERED, That the Clerk of this Court transfer on the registry of this Court to Harry Weinberger, the person depositing the said sum of money, the

sum of $10000, to be applied on the supersedeas bond ordered by Hon. Louis D. Brandeis, Associate Justice of Supreme Court.

MARTIN T. MANTON,
U. S. District Judge.

Consented to

U. S. Attorney.
By HAROLD A. CONTENT,
Asst U. S. Attorney.

56

Order of September 10, 1917, *re* Payment of Cash Bail.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES
v.
ALEXANDER BERKMAN.

The Clerk of this Court having retained in the 57
Registry of this Court the sum of Ten thousand ($10,000) Dollars, heretofore deposited in lieu and in place of bail in the above-entitled matter.

Now, upon the consent of Francis G. Caffey, United States Attorney for the Southern District of New York, it is hereby

58 *Order of September 10, 1917, re Payment of Cash Bail.*

ORDERED that the Clerk of this Court accept into the Registry of this Court the sum of Fifteen thousand ($15,000) Dollars, and in addition thereto apply the above-mentioned sum of Ten thousand ($10,000) Dollars in lieu and in place of bail, on a certain writ of error to the Supreme Court of the United States, and in addition to a recognizance given this day by the said defendant.

Dated, New York, September 10th, 1917.

JULIUS M. MAYER,
59 *United States District Judge.*

Consented To:
FRANCIS G. CAFFEY,

By HAROLD A. CONTENT,
Assistant District Attorney.

60

61

Order of February 5, 1918, *re* Payment of Cash Bail.

At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, at the United States Court House and Post Office Building, Borough of Manhattan, City of New York, this 5th day of Feb., 1918.

Present:

JULIUS M. MAYER,
District Judge.

62

THE UNITED STATES

v.

ALEXANDER BERKMAN *et al.*

An order having heretofore been made in this case authorizing the Clerk of this Court to accept the sum of $25,000 cash, and to deposit the same in the registry of this court in lieu and place of bail for the appearance of the above-named defendant, pending determination of appeal to the United States Supreme Court, in accordance with the provisions of the bond given by the said defendant; and subsequently the said defendants' conviction having been approved by said Court, it is 63

ORDERED, That the Clerk of this Court pay out of the registry of this Court to Harry Weinberger,

64 *Order of February 5, 1918, re Payment of Cash Bail.*

---

the person depositing the said sum of money, the sum of $15,000, less the Clerk's fees, if any.

J. M. MAYER,
U. S. District Judge.

Consented to:

U. S. Attorney.

By
J. E. WALKER,
65 Asst. U. S. Attorney.

66

Order of March 15, 1918, *re* Payment of Cash Bail. 67

At a Stated Term of the United States District Court for the Southern District of New York, in the Second Circuit, held in the Post Office Building, in the Borough of Manhattan, City of New York, this 15th day of March, 1918.

Present:

Hon. AUGUSTUS N. HAND,
District Judge.

THE UNITED STATES
Plaintiff,

against

EMMA GOLDMAN and ALEXANDER BERKMAN,
Defendants. 68

A motion having been made by the United States Attorney for an order directing the clerk of the United States District Court to take out of the Registry of this Court into the Treasury of the United States, the sum of Twenty thousand ($20,000.) Dollars, deposited in lieu of bail by Harry Weinberger for Emma Goldman and Alexander Berkman, and a counter motion having been made by Harry Weinberger for an order directing the Clerk to pay to him out of the Registry of this Court the sum of Twenty thousand ($20,000.) Dollars, deposited as cash bail for the appearance of Emma Goldman and Alexander Berkman to answer the judgment of the United States Supreme Court, and the said motions having come on to be heard, and after due deliberation having been had 69

70 *Order of March 15, 1918, re Payment of Cash Bail.*

thereon, and upon reading and filing the notice of motion, dated February 2nd, 1918, and the affidavit of John E. Walker, verified the 2nd day of February, 1918, and after reading and filing the affidavit of Harry Weinberger, verified the 7th day of March, 1918, in opposition thereto, and

Upon reading and filing the notice of motion of Harry Weinberger, and the affidavit in support thereof, verified the 6th day of March, 1918, and upon the opinion of Hon. Augustus N. Hand, United States District Judge, dated the 11th day of March, 1918, it is

71 ORDERED, that the motion of the United States be and the same is hereby in all respects denied, and it is further

ORDERED, that the motion of Harry Weinberger be and the same is hereby in all respects granted, and upon reading and filing the annexed affidavits of Emma Goldman, verified the 13th day of March, 1918, and Alexander Berkman, verified the 15 day of March, 1918, and all proceedings had herein, it is further

ORDERED, that the Clerk of this Court pay out of the Registry of this Court to Harry Weinberger, the person depositing the said Ten thousand ($10,000.) Dollars for the appearance of Emma Goldman, the sum of Ten thousand ($10,000.00) Dol-
72 lars, less the Clerk's fees, if any; and it is further

ORDERED, that the Clerk of this Court pay out of the Registry of this Court to Harry Weinberger, the person depositing the said Ten thousand ($10,000.) Dollars, for the appearance of Alexander Berkman, the sum of Ten thousand ($10,000.00) Dollars, less the Clerk's fees, if any.

AUGUSTUS N. HAND,
United States District Judge.

Assignments of Error. 73

IN THE

DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER BERKMAN and EMMA GOLDMAN,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error. 74

Now comes the above-named Alexander Berkman and Emma Goldman, plaintiffs-in-error, by their attorney, to make and file the following assignments of error upon which they will rely upon the prosecution of the Writ of Error to the Supreme Court of the United States sued out by them herein to review the errors committed in the above-entitled cause in the United States District Court for the Southern District of New York and in the proceedings had therein and against them in the said Court. That the District Court erred as follows:

FIRST: In construing Section 828 of the Revised Statutes of the United States as authority for the Clerk of the United States District Court for the Southern District of New York to deduct one per centum of moneys deposited as cash bail for plaintiffs-in-error in a criminal case, pending trial, and deduct one per centum of moneys deposited as cash 75

76 *Assignments of Error.*

bail for plaintiffs-in-error in a criminal case, pending appeal to the United States Supreme Court.

SECOND: In not granting the motion of the plaintiffs-in-error in conformance with the mode of process against defendants in the State of New York as required by United States Revised Statute 1014.

THIRD: It violates Article V of the Amendments to the United States Constitution, which reads as follows:

77 "No person shall * * * be deprived of * * * liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

That this law deprives the bailor of plaintiffs-in-error of his property without due process of law, and takes his property without compensation, and thereby tends to deprive plaintiffs-in-error of their liberty.

It violates Article IV, Section 2, Subdivision 1, of the Constitution, which reads as follows:

78 "The Citizens of each state shall be entitled to all privileges and immunities of Citizens in the Several States."

Under Article XIV of the Amendments to the Constitution of the United States citizens of the States are now also citizens of the United States and are entitled to equality before the law.

Section 828 of the United States Revised Statutes makes class distinction between those who give real estate as bail or a surety company bond and those who give cash as bail, charging cash a fee of 1% whether before conviction or after conviction pending appeal, and real estate and surety company bonds are not charged any fees.

It violates Article IV of the Amendments to the Constitution, which reads as follows:

> "The right of the people, to be secure in their persons * * * and effects, against unreasonable * * * seizures shall not be violated. 80
> * * *."

It violates Article VIII of the Amendments, which reads as follows:

> "Excessive bail shall not be required."

This law is practically forcing the defendants to give surety company's bond or real estate bond, with the accompanying necessity of paying whatever fees are charged, and is, therefore, excessive.

WHEREFORE, the said Alexander Berkman and Emma Goldman, plaintiffs-in-error, pray that the said order herein for the errors aforesaid be reversed and altogether held for nought, and that the 81
District Court for the Southern District of New York be directed to grant the motion dated December 18th, 1918, and order Alexander Gilchrist, Jr., Clerk of the United States District Court for the Southern District of New York, to pay to Harry Weinberger the sum of Eight hundred ($800) Dol-

82 *Assignments of Error.*

lars, deducted by said Alexander Gilchrist, Jr., from Eighty thousand ($80,000) Dollars cash deposited for bail on behalf of Alexander Berkman and Emma Goldman, and for such other and further relief as to the Court may seem proper.

Dated, New York, January 17th, 1919.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error,
Office & P. O. Address,
261 Broadway,
Borough of Manhattan,
83 City of New York.

84

Petition for Writ of Error.

IN THE

DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Plaintiff,

against

ALEXANDER BERKMAN and EMMA GOLDMAN,
Defendants.

Now comes the above-named Alexander Berkman and Emma Goldman, by their attorney, and complain that on the 17th day of January, 1919, the District Court of the United States for the Southern District of New York made an order in the above-entitled case against the defendants, in which order certain errors were committed, to the prejudice of these defendants:

FIRST: In respect to the Court's construction and application of the Constitution of the United States and its disposition of the merits of the cause and its construction of the laws of the United States, all of which will appear more in detail from the assignments of error which are filed with this petition.

WHEREFORE, the said defendants, Alexander Berkman and Emma Goldman, pray for the allow-

88 *Petition for Writ of Error.*

ance of a writ of error and such other orders and process as may cause all and singular the record and proceedings in said cause to be sent to the Honorable the Justices of the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and so that the same being inspected the said Justices of the Supreme Court of the United States cause further to be done therein to correct that error what of right and according to law ought to be done.

And your petitioner will every pray, etc.

Dated, New York, January 17, 1919.

89

HARRY WEINBERGER,
Attorney for Defendants,
Alexander Berkman and
Emma Goldman,
Office & P. O. Address,
261 Broadway,
Borough of Manhattan,
City of New York.

90

Citation.

91

By the Honorable Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to The United States of America, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear before the United States Supreme Court, to be holden in the City of Washington, in the District of Columbia, on the 15th day of February, 1919, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Alexander Berkman and Emma Goldman are plffs.-in-error 92
and you are defendant-in-error, to show cause, if any there be, why the order in said cause mentioned should not be corrected and speedy justice should not be done in that behalf.

GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 17th day of January, in the year of our Lord One Thousand Nine Hundred and Nineteen, and of the Independence of the United States the One Hundred and Forty-third.

93

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

A. G., JR.

94 **Stipulation as to Record.**

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER BERKMAN and EMMA GOLDMAN,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

95 It is hereby stipulated and agreed that the record in the above-entitled case shall consist of the following papers now on file with the Clerk of the United States District Court for the Southern District of New York; writ of error and order allowing same, dated the 17th day of January, 1919; notice of motion and affidavit of Harry Weinberger, dated December 18th, 1918; order, dated the 17th day of January, 1919, denying motion; decision of Judge Learned Hand, dated December 21st, 1918; two orders accepting cash bail, filed June 25th, 1917; orders *re* payment of cash bail, dated July 11th, 1917; July 28th, 1917; September 10th, 1917; February 5th, 1918; March 15th, 1918; assignment of error, dated January 17th, 1919;
96 petition for writ of error, dated January 17th, 1919; citation, dated January 17th, 1919; stipulation settling record, and certificate, dated February 7th, 1919.

Dated, New York, January 28, 1919.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error.

S. LAURENCE MILLER,
United States Attorney for the
Southern District of New York,
Attorney for Defendant-in-Error.

Stipulation Settling Record.

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UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER BERKMAN and EMMA GOLDMAN,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

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It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, New York, February 7th, 1919.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error.

FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York,
Attorney for Defendant-in-Error.

99

100 **Clerk's Certificate.**

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ALEXANDER BERKMAN and EMMA GOLDMAN,
Plaintiffs-in-Error,

against

UNITED STATES OF AMERICA,
Defendant-in-Error.

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I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed in the City of New York, in the Southern District of New York, this 10th day of February, one thousand nine hundred and nineteen.

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ALEXANDER GILCHRIST, JR.,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

ALEXANDER BERKMAN and EMMA GOLDMAN, Plffs.-in-error, vs. UNITED STATES OF AMERICA, Deft-in-error.	No. 865.

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

Statement of the Case.

On the 15th day of June, 1917, Emma Goldman and Alexander Berkman were arrested in the City of New York and charged with conspiracy to violate the Draft Law. On the 21st day of June, 1917, Harry Weinberger deposited with the Clerk of the United States District Court $25,000 in cash, as bail, and on the 25th day of June, 1917, Harry Weinberger deposited an additional $25,000 in cash as bail for Alexander Berkman.

On the 11th day of July, 1917, $30,000 was paid out of the registry of the Court, less 1 per cent. fee claimed by the Clerk, leaving $20,000 with Clerk. Upon an appeal to this Court and an order of supersedeas, $30,000 cash was re-deposited by Harry Weinberger as bail for Alexander Berkman and Emma Goldman. Thereafter $15,000 cash, less 1 per cent., Clerk's fees, was withdrawn. After the affirmation of the conviction, defendants having been sentenced to two years and $10,000 fine, $35,000 cash was withdrawn, less 1 per cent., claimed as Clerk's fees.

A motion was made to compel the Clerk to return $800, the total amount deducted by him as his fees, and from an order denying the motion, an appeal is taken to this Court on the ground that the taking of the 1 per cent. is unconstitutional, or that the construction of Sec. 828 of the U. S. Revised Statues, as applicable to criminal bail, was incorrect.

This case is exactly similar to the case of *William B. Bales* v. *The United States*, No. 895, October Term, 1917, in this Court, in which the United States Solicitor General confessed error on the 28th day of October, 1918. Judge Learned Hand in his decision, denying the motion in this case, also said:

> "I cannot, however, agree with the contention of the Clerk that this case differs from *Bales* or from *Giovanitti*" (fol. 30).

POINTS.

The argument of the errors above set forth will be made under headings as follows:

I. Section 828 of the U. S. Revised Statutes does not apply to criminal cases.

II. Mode of bail in New York State does not allow a charge of 1 per cent. for cash bail.

III. It violates Article V of the amendments to the U. S. Constitution.

IV. It violates Article IV, Section 2, Subdivision I, of the Constitution.

V. It violates Article VIII of the amendments.

ARGUMENT.

POINT I.

Section 828 of the Revised Statutes does not apply to criminal cases.

There is nothing to show that Section 828 included criminal cases in fees to be charged. If it had been intended it would have been easy enough to so state. Criminal statutes must be strictly construed and if there is any doubt, that doubt must be resolved against the right of the Clerk to take the 1 per cent., especially as it works an injustice to a defendant and his bailor.

If the law is to be construed that the Clerk is entitled to 1 per cent. on cash bail, they are entitled to that whether the defendant is acquitted or con-

victed; no distinction is made in the law. The case of *Bales* v. *U. S.*, in which a confession of error was made by the Solicitor General, Bales was held for the Grand Jury and cash bail deposited, but he was never even indicted, yet if the construction of the law now contended for is correct, the 1 per cent. was due in that case as well as in this, for the law is plain, "for receiving, keeping, and paying out money, etc., one per centum, * * *" no distinctions of guilt or innocence are made in the law. Yet the Solicitor General confessed error, the injustice of the construction being entirely too apparent in that case.

Justice calls for bail unimpeded, the right being absolute.

If the Government has the right to charge 1 per cent. on cash bail, why not 10 or 20 per cent, or take the entire bail. If they can do that on cash bail, they have the right to charge fees on other bail and thus emasculate all provisions of the Constitution protecting the right to bail. To state this proposition is to answer it by showing the absurdity of the construction contended for by the Government.

Where, as in the *Bales* case, a man is not even indicted, this taking of 1 per cent. means that a defendant is fined and penalized for being innocent; fined and penalized for the Goverment's mistake; fined and penalized because he was arrested on suspicion; fined and penalized because someone, perhaps, desired to use the forces of Government in oppression; fined and penalized with the consent of the Court and the law, though absolutely innocent. Injustice consummated by fiat of Government is still injustice.

The Court below did not award costs against these defendants, which it could have done in addition to the $10,000 fine. The Court not having

awarded costs against the defendants, yet that result is accomplished by indirection and collected against property not belonging to the defendants and attempted to be justified by Solicitor General as costs. Judge Hand in deciding this motion against the plaintiffs-in-error, notwithstanding, specifically ruled that the contention of the Government was incorrect (fol. 30). The entire spirit of our law is that all punishment of whatsoever kind when imposed upon a defendant after conviction, authority for it must be found in the law.

Clerk's fees, Section 828 of the Revised Statutes, reads:

> "For issuing and entering every process, commission, summons, capias, execution, warrant, attachment, or other writ, except a writ of venire, or a summons or subpoena for a witness, one dollar.
>
> For issuing a writ of summons or subpoena twenty-five cents.
>
> For filing and entering every declaration, plea or other paper, ten cents.
>
> For administering an oath or affirmation, except to a juror, ten cents."

Would it be contended that a defendant could not have his day in court if he could not pay the Clerk 10 cents for every witness sworn in his defense?

After various other charges Section 828 provides:

> "For receiving, keeping and paying out money, in pursuance of any statute or order of court, one percentum on the amount so received, kept and paid. * * *"

Section 1015 of the Revised Statutes:

> "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death. * * *"

Section 1034 of the Revised Statutes:

> "* * * the court before which he (the defendant) is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours. He shall be allowed, in his defense, to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution."

If defendant cannot pay assigned counsel, or for the process he desires to use to make his defense, what good is this right?

Is it not clear that all these provisions are for the benefit of a defendant and not as obstacles; that he is to have his day in court and bail free of expense?

Money or other security deposited as bail by a third party for a defendant remains the property of that third party for all other purposes, except the right of the United States to hold it as security for the purposes of bail. That is the contract with the Government, and when a defendant is surrendered to the Court, the contract has been executed, the lien of the Government upon the cash or real estate or surety company is ended and the bail released, the sureties being entirely discharged by the operation of the law where there has been a compliance with the condition of the bond.

It must be very apparent that in these days of war and high passions, when surety companies refuse to go bail in so-called "war cases," as they did in this case, and when individuals are often afraid to appear as bondsmen, for fear of being considered pro-German or Bolsheviks, that the purpose of the law that every defendant should have his day in court and should be released on bail pending the trial or appeal, can only be carried out by the deposit of cash bail.

The bail in this case was deposited before conviction and thereafter new bail and new money was deposited after conviction pending an appeal to the United States Supreme Court. Before trial, there being a presumption of innocence, bail being deposited certainly should be unlimited and unpenalized and untaxed. After conviction, the defendant being entitled to be released on bail pending appeal until the Court of last resort passes upon his case, certainly the giving of new bail for appeal purposes, as in this case, ought not to be penalized.

POINT II.

Mode of bail in New York State does not allow a charge of 1 per cent. for cash bail.

Section 1014 of the United States Revised Statutes provides:

> "For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or inferior court, chief or first judge of common pleas, mayor of a city, justice of the

> peace, or other magistrate, of any State where he may be found, and *agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be,* for trial before such court of the United States as by law has cognizance of the offense. * * *"

Congress intended to assimilate all the State proceedings and practice in reference to persons accused in that State.

> *U. S.* v. *Rundlett,* 2 Curtis, 41.
> *U. S.* v. *Turcand,* 20 F. R., 621.
> *Turner* v. *U. S.,* 19 Ct. Cl., 629.
> *U. S.* v. *Harden,* 10 Fed. R., 802.
> *U. S.* v. *Ewing,* 140 U. S., 142.
> *U. S.* v. *Patterson,* 150 U. S., 65, 67.
> *Insley* v. *U. S.,* 150 U. S., 512, 515.
> *Rand* v. *U. S.,* 36 Fed. R., 671.

The arrest, imprisonment or bailing shall be at the expense of the United States. If the Clerk has a claim of 1 per cent., it is a claim as against the United States, and not as against the defendants or their bailor, because if the Court wanted those expenses to be paid by the defendant, it should have imposed costs as against the defendants, including the fine which is the usual manner of making defendants in the United States Courts pay the costs of the prosecution. The State practice by this Section, is made applicable to the United States practice in the Southern District of New York, and under the law of the State of New York, there can be no such charge of 1 per cent. as against cash bail. Section 586 of the New York Code of Criminal Procedure allows money to be deposited in lieu of bail, and Section 592 regulates the ordering of the return of the deposit.

POINT III.

Violates Article V of the Amendments to the United States Constitution.

> "No person shall * * * be deprived of * * * liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

This practice of taking 1 per cent. deprives the bailor of plaintiffs-in-error of his property without due process of law, and takes his property without compensation. If we have the absolute right to give bail, defendants having been surrendered to answer the judgment of the Court, the letter of the bond has been satisfied and the bailor has the absolute right to the return of his security, and any taking of part or all of same by the Court on any pretext (defendants having been surrendered to the Court) is directly in violation of Article V of the Amendments.

POINT IV.

It violates Article IV, Section 2, Subdivision 1 of the Constitution.

> "The citizen of each state shall be entitled to all privileges and immunities of citizens in the several states."

The construction of Section 828 of the Revised Statutes by the Court makes class distinction between those who give real estate as bail or a surety company bond, and those who give cash, after all the best security as bail; charging cash a fee of 1 per cent. whether before or after conviction pending appeal.

Petersdorff, *Law of Bail*, page 7, says:

> "As it did not infrequently occur that persons arrested upon mesne process were not able to find sufficient sureties for their appearance, and were yet capable of making a deposit of the money for which they were arrested, the statute 43 Geo. 3, c. 46, s. 2 was introduced in which after reciting that it is expedient that persons arrested should upon making such deposit, be permitted to go at large until the return of the writ."

This right of giving cash bail comes from the common law.

There can be no question that any impediment toward the giving of bail works a hardship on defendants who may be brought into court to face a criminal charge. The construction of the Court puts additional burdens on certain classes. Nothing is charged by the Government for investigating the sufficiency of the real estate or the reliability of the bonding company, so if the trouble of the Clerk is considered, it is less in cash bail cases, and no reason for the distinction or discrimination exists.

Kent in his *Commentaries*, Vol. 2, page 2 (13th edition):

> "It was their (the colonists) fundamental doctrine that * * * justice ought to be equally, impartially, freely, and promptly administered."

Cicero, in his treatise *De Republica*, Lib. 1, Section 32, insisted that equality of rights was the basis of a commonwealth; for since property could not be equal, and talents were not equal, rights ought to be held equal among all the citizens of the

State, which was, in itself, nothing but a community of rights.

When a denial of rights of liberty and property is the subject of complaint, the attempt to justify interference always takes the form of a plea of the State's sovereignty in the exercise of its power of taxation or the police power, taking the last in its widest sense.

POINT V.

It violates Article VIII of the Amendments.

"Excessive bail shall not be required."

Kent, Vol. 2, page 13 (13th Ed.) said:

> "As a further guard against abuse and oppression in criminal proceedings, it is declared that excessive bail cannot be required."

Any impediment to the giving of bail, or preventing the giving of bail is exactly the same as requiring excessive bail. It works to prevent a defendant being released on bail. If Congress could tax 1 per cent. on cash bail, it could tax it 90 per cent., or 100 per cent., or tax similarly other kinds of bail, and so prevent it, thus circumventing the prohibition of this section. It was the intention of the Constitution to absolutely make sacred the right to bail, without any impediment and not too large bail.

CONCLUSION.

It is respectfully submitted that the decision of the Court below in construing Section 828 of the U. S. Revised Statutes should be reversed, or that Section 828 as applicable to criminal cases be declared unconstitutional.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error,
261 Broadway,
Borough of Manhattan,
City of New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

ALEXANDER BERKMAN and EMMA GOLDMAN, Plaintiffs-in-Error, against THE UNITED STATES OF AMERICA, Defendant-in-Error.	No. 865.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION BY ALEXANDER BERKMAN AND EMMA GOLDMAN TO ADVANCE.

Comes now Harry Weinberger, attorney for plaintiffs-in-error, and respectfully moves the Court for the advancement of the above-entitled case on a day convenient to the Court.

On the 15th day of June, 1917, Emma Goldman and Alexander Berkman were arrested in the City of New York, and charged with conspiracy to violate the Draft Law. On the 21st day of June, 1917, Harry Weinberger deposited with the Clerk of the United States District Court $25,000 in cash as bail,

and on the 25th day of June, 1917, Harry Weinberger deposited an additional $25,000 in cash as bail for Alexander Berkman.

That on the 11th day of July, 1917, $30,000 was paid out of the registry of the Court to Harry Weinberger, less 1 per cent. fee claimed by the Clerk. Upon an appeal to this Court and an order of supersedeas, $30,000 cash was deposited for Alexander Berkman and Emma Goldman. Thereafter $15,000 cash, less 1 per cent., Clerk's fees, was withdrawn. After the affirmation of the conviction, $35,000 was withdrawn, less 1 per cent., Clerk's fees.

A motion was made to compel the Clerk to return $800, amount deducted by him as his fee, and from an order denying the motion, an appeal is taken to this Court on the ground that the taking of the 1 per cent. is unconstitutional, and that the construction of the law by the Judge was incorrect.

This case is exactly similar to the case of *William B. Bales* v. *The United States,* in this court, in which the United States Solicitor General confessed error on the 28th day of October, 1918, and Judge Learned Hand in his decision, denying the motion in this case, said:

> "I cannot, however, agree with the contention of the Clerk that this case differs from Bales or from Giovanitti."

In the *Bales* case a motion to advance was granted by this Court with the consent of the Solicitor General, and upon about the same grounds as here stated: The reasons for the advancement of the *Bales* case for argument still exists. The case is important as affecting all criminal cases, where bail is given pending indictment or trial or appeal.

People are still to-day often hurriedly arrested on suspicion; or after indictment or conviction and an appeal being taken, bail cannot be secured, because bonding companies have made it a rule, which is still in force, not to go bond on so-called "War Cases," and individuals with real estate are often afraid to give real estate as security for bail, as they believe their patriotism might be questioned or that they may be called "Bolsheviks," and so it is necessary to give cash bail in most instances. Yet if the Clerk of the Court is really authorized to take 1 per cent. of all cash bail, though he charges nothing to bonding companies or real estate, the difficulty of obtaining cash bail is greatly increased, and the purpose of the law that every individual shall have his day in court and shall be free on bail to prepare his trial or pending a decision on appeal is greatly hindered and sometimes made impossible. It is therefore respectfully requested that this case be advanced for argument to the earliest date possible.

Notice of this motion has been served on the Solicitor General for the United States.

HARRY WEINBERGER,
Attorney for Plaintiffs-in-Error.

February, 1919.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

ALEXANDER BERKMAN AND EMMA GOLDMAN, plaintiffs in error,
v.
THE UNITED STATES OF AMERICA. } No. 865.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The plaintiffs in error were indicted for conspiracy to violate the Selective Draft Law of May 18, 1917, 40 Stat., 75. Pursuant to orders of court (Rec. 12, 13), they deposited in the registry of the District Court for the Southern District of New York certain monies in lieu of bail. They were convicted and sentence executed upon them (*Goldman and Berkman* v. *United States*, 245 U. S. 474). Subsequently the amount deposited was returned to them less the clerk's fee of 1 per cent allowed by Section 828, R. S. They thereupon moved the court for an order directing the clerk to pay to them this 1 per cent (Rec. 13). This motion was denied (Rec. 3, 4), and to this order of the court the present writ of error was sued out (Rec. 1),

The District Court rendered an opinion (Rec. 28) in which he mainly relied upon his former opinion in a similar case of Givanitti—printed as an appendix to this brief. In the latter opinion the court held that the clerk was clearly entitled, under the express provision of Section 828, R. S., to 1 per cent of money deposited with him in lieu of bail, and that, as between the United States and the defendants, the latter must pay it, since the United States was not liable for costs of this character in the absence of a statute expressly so providing.

ASSIGNMENTS OF ERROR.

The assignments of error (Rec. 25–27) are:

1. The court erred in construing Section 828, R. S., as authorizing the deduction by the clerk of a fee of 1 per cent.

2. The court erred in not following the State practice which is claimed to be favorable to the motion.

3. Section 828, R. S., as construed by the court, is unconstitutional because

(*a*) It takes defendants' property without due process of law (Amendment V);

(*b*) It discriminates between those who give cash bail and those who do not, in violation of Article IV, Section 2, Subdivision 1, and of Amendment XIV, of the Constitution;

(*c*) It authorizes an unreasonable seizure (Amendment IV);

(*d*) It constitutes excessive bail (Amendment VIII).

Passing for the moment the alleged constitutional questions, the points involved in the case are

1. Whether the right of the clerk to the 1% and the person liable to pay it are to be determined by the State practice or by the statutes of the United States and the decisions of the Federal courts;

2. Whether the clerk is entitled at all to retain 1% of money deposited in lieu of bail;

3. If he be entitled to retain it, should it be deducted from the money deposited, at the expense of the defendant, or should it be paid by the United States?

ARGUMENT.

I.

The Constitutional questions are frivolous, and the writ of error should be dismissed.

The plaintiffs in error are not entitled to come directly from the District Court to this Court on the question of the construction of the statutes of the United States, or the decisions of the courts thereon, by a mere claim that the Constitution is involved. *Judicial Code*, Section 238; *Rakes* v. *United States*, 212 U. S. 55, 58; *Lamar* v. *United States*, 240 U. S. 60, 65. They must, therefore, assume a construction of the statutes against them, and their claim must be that Congress has no power to enact that a defendant shall pay poundage to the clerk on money voluntarily deposited by him in lieu of bail. Such a claim is frivolous, the provisions of the Constitution referred to by plaintiffs in error having no application. It is not taking property without due process of law to compel a party to a cause to pay for services rendered

at his voluntary request and for his benefit. Costs may constitutionally be taxed. *Farmers' Ins. Co.* v. *Dobney*, 189 U. S. 301, 304; *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 651, 652; *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 412, 432.

Nor is Article IV, Section 1, or Article XIV of the Amendments, of the Constitution any more applicable. Each applies only to State action. *United States* v. *Harris*, 106 U. S. 629, 643.

If it be assumed that the United States is prohibited by implication from discrimination between persons (See *United States* v. *Heinze*, 218 U. S. 532, 546), there is nothing arbitrary or grossly unfair in distinguishing between those defendants who give recognizance with surety and those who give cash bail, requiring the latter to pay a fee for the safekeeping of the money. It is in no sense a discrimination. The service of holding the deposit is not performed for those who give a bond with surety. In the absence of statute, money can not be taken in lieu of bail, *United States* v. *Faw*, 1 Cranch. C. C. 486, *State* v. *Owens*, 112 Iowa, 403, 407, and cases cited. The statute which grants this privilege may constitutionally require that the person exercising it shall be subject to the burdens necessarily involved.

The points as to unreasonable search and seizure and excessive bail, if the plaintiffs in error are in any position to raise them on this application, need only be stated to demonstrate their lack of substance.

II.

The right of the clerk to charge a commission, and the obligation of the plaintiffs in error to pay it is to be determined by the law of the United States and not by the law of New York.

Section 1014, R. S., provides, in so far as material:

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail; * * * or by any chancellor, judge of a supreme or superior court, * * * or other magistrate, of any State where he may be found, *and agreeably to the usual mode of process against offenders in such State*, and at the expense of the United States be arrested and imprisoned, or bailed as the case may be * * *. [Italics ours.]

The claim of the plaintiffs in error is that, since under Section 586 of the Criminal Code of New York money may be deposited in lieu of bail and it is expressly provided that such money shall be returned on termination of the proceedings, the same procedure must be adopted in the United States Courts which, in this respect, are required by Section 1014 to follow the State law.

The answer to this is that Section 586 of the Criminal Code of New York is a mere municipal regulation, addressed to the courts of that State, and inapplicable to courts of the United States. The section provides that the justice or magistrate taking money in lieu of bail shall deposit it in the same manner as is

provided by law for the payment and deposit of money with the clerk of such court. Evidently a federal magistrate receiving money in lieu of bail could not lawfully deposit it as required by the New York law, but could only act under authority of a law of the United States. If there be no such law, the Federal magistrate has no power to take cash bail. (See *United States* v. *Faw*, 1 Cranch C. C. 486.) In the present case the deposit was made with the United States District Court, evidently under the authority given or implied in Sections 828, 995, and 996, R. S., and Section 99, Criminal Code. Having acted under this authority, the plaintiffs in error are restricted to the question of the construction of these and germane federal statutes and the decisions thereon, without reference to the State law. The case in this aspect is similar to *Duncan* v. *Darst*, 1 How. 301, and *Gwin* v. *Breedlove*, 2 How. 29. In the former case the Court said (1 How. 306):

> It follows, that a State law, regulating the practice of State courts, and addressed to its judges and magistrates; but which can only be executed by them, or with their aid, is a peculiar municipal regulation; not adopted by the acts of Congress, nor applicable to the courts of the United States.

Compare *United States* v. *Ewing*, 140 U. S. 142, 144, with *United States* v. *Patterson*, 150 U. S. 65.

Further, the money deposited is returned on the termination of the proceedings. The person entitled to it owes 1% for the service of the clerk

in respect to it. The clerk deducts it as a credit due to him in accounting for it in full. If the defendant paid the charge he would receive the full amount originally deposited.

III.

The clerk was entitled under Section 828, R. S., to a fee of 1 per cent on money deposited in lieu of bail.

1. The order of court in the case at bar provided:

> That the sum of 25000 Dollars, cash, be deposited in the Registry of this Court in lieu and place of bail for the appearance of the above-named defendant before the United States District Court for the Southern District of New York, in accordance with the provisions of the recognizance to be given by said defendant Emma Goldman. (Rec. 12.)

2. Sections 995 and 996, R. S., provide for

> moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court,

their custody and withdrawal. Section 99 of the Criminal Code punishes the failure of the clerk to duly deposit money "belonging in the registry of the court," and his embezzlement thereof. Section 823, R. S., provides that

> the following and no other compensation shall be taxed and allowed to * * * clerks of the district courts.

Section 828, R. S., constituting the clerk's fee bill, provides *inter alia:*

> For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid.[1]

3. The facts of the present case bring it squarely within Section 828, R. S. The money was, on order of court, and with the consent of defendants, "received, kept, and paid" by the clerk. The section applies to money received in criminal cases. *United States* v. *Kurtz*, 164 U. S. 49, 53. The clerk performed the services required of him by the court, and is entitled therefore to the fee granted by law. In *United States* v. *Van Duzee*, 140 U. S. 169, 176, 177, this Court said:

> When the clerk performs a service in obedience to an order of the court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such such services.

Even if the United States Courts have no power to accept cash bail, the plaintiffs in error, having voluntarily given such bail in order to obtain freedom, are estopped to set up the lack of power, and must take the lawful burdens with the benefits. *Casper* v. *Rivers*, 95 Miss. 423; *Smart* v. *Cason*, 50 Ill. 195; *State* v. *Reiss*, 12 La. Ann. 166; *State* v. *Owens*, 112 Iowa 403; *Souskelonis* v. *New Britain*, 89 Conn. 298.

[1] The functions of the clerk as to monies paid into court are fully discussed in *Howard* v. *United States*, 184 U. S. 676, 683–687.

The only decision which has been found that the clerk is not entitled to this fee is that of the District Court for Porto Rico in *United States* v. *Cook*, 7 P. R. Fed. 28. It rests upon the argument that the money is taken simply in place of a recognizance; as no fee could be charged under this heading for a recognizance, none can be charged for the money. The reasoning is unsatisfactory, since it fails to deal with the language of the statute—the controlling feature.

> Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statutes. They are not open to equitable construction by the courts nor to any discretionary action on the part of the officials. *United States* v. *Shields*, 153 U. S. 88, 91.

In the present case the money *was* received by the clerk under an order of court, *was* kept and paid by him in his capacity as clerk, and the statute grants him a fee therefor. The application of the statue cannot be avoided because in other—it may be similar—cases Congress has not granted to the clerk a similar fee.

IV.

The plaintiffs in error—and not the United States—are liable for the clerk's fee.

1. Assuming that the clerk was entitled under Section 828, R. S., to a fee for money deposited in lieu of bail, the sole remaining question is whether this fee

of costs against the United States. Section 856, R. S., provides that

> the fees of * * * clerks * * * in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the Treasury;

but this must be taken to apply only to fees for services rendered the United States, other fees being payable by the parties liable for them (R. S. 857). So section 981, R. S., providing for taxation against the United States of witnesses before a commissioner, clearly refers to the cost of testimony on behalf of the Government.

On the other hand Section 152, R. S., relating to costs against United States from the time of joining issue in the Court of Claims; Section 5 of the Act of July 20, 1892, 27 Stat., 252, providing that the United States shall not be liable for the costs of a suit *in forma pauperis;* Sections 975, 976 and 3214, R. S., relating to costs in cases where an informer is involved; Section 970 relating to costs in admiralty seizures for violation of an act of Congress; all imply that as a general thing the United States is not liable for any costs other than its own; and this rule is evidently applicable to the case at bar, since no statute specifically makes the United States liable for the defendants' costs in such a case as the present.

4. The question therefore resolves itself to this: Was the cost involved in the custody by the clerk of the money deposited by defendants incurred at the instance of, on behalf of, or for the benefit of the

United States? If it was, the United States should pay it, just as any other item of its own costs. If it was not, the United States is not liable for it, and the burden of it, therefore, necessarily falls on defendants.

In *United States* v. *Ewing*, 140 U. S. 142, 146, it was held that a United States Commissioner was entitled to charge for an acknowledgment of defendant's sureties in a criminal case, because Section 828 R. S., allowed the clerk a fee for taking an acknowledgment. This was followed in *United States* v. *Barber*, 140 U. S. 164, 166, 167, where this court said:

> The fourth series of items relates to charges in connection with the recognizances of defendants for examination. We have already held in *United States* v. *Ewing, ante*, 142, that a charge for the acknowledgment of recognizances was proper, though but one acknowledgment for each recognizance can be allowed. There is no valid objection to the allowance for the oaths of sureties and the jurats to such oaths. It is usual and proper to require that persons offering themselves as sureties for the appearance of the accused in court shall justify to their pecuniary responsibility, and the expense of their so doing stands upon the same footing as the recognizance itself. It is true that the taking of recognizance or bail for appearance is primarily for the benefit of the defendant, and in civil cases it is usual to require the costs of entering into such recognizances to be

On the other hand the cost of furnishing a formally complete "bail" must be borne by defendant. (*Jones's Case.* See also *United States* v. *Allred*, 155 U. S. 591, 596, pt. 2.) Thus the cost of indemnifying the surety, or of the premium, if the bond be procured from a surety company, is the defendant's. In an equal degree, if the defendant be unable to furnish a bond and be driven to exercise his privilege to deposit cash in lieu of bail, such cash "bail" is not formally complete until it is deposited in safe custody, promptly available on default. Just as the seal is necessary to a recognizance, so the seal of the registry of the court is necessary to cash "bail," and the cost of this seal, in one case as in the other, must be borne by defendant.

5. The attention of the Court should also be called to that portion of Section 1014, R S., providing that the preliminary proceedings before the examining magistrate, including bail, shall be "at the expense of the United States." This provision, however, is not applicable to the case at bar because it does not appear that the cash bail in question was given in preliminary proceedings governed by this section. On the contrary, it appears to have been given generally for all purposes for which bail is permitted under Section 1015, R. S.

Moreover, it is clear that the language referred to is merely intended to assure the magistrates, Federal or State, before whom the proceedings are brought, that the United States will guarantee their costs in the arrest and binding over of criminals; not

that the United States, as between itself and a person convicted of violating its laws, will in all cases bear the expense of his arrest, detention, or liberation on bail.

V.

THE BALES CASE.

The plaintiffs in error rely on the confession of error made by the United States in *Bales* v. *United States*, No. 895, October Term 1917. That case, however, differed from the present.

In the present case the defendants were convicted, in the *Bales* case the defendant was improperly arrested and was dicharged without indictment. Had the United States been liable for costs, judgment therefor could properly have been rendered against it.

In the case at bar, however, while the court did not in the sentence formally adjudge costs against the defendants, the Government prevailed and convicted them so that *they* had no right to a judgment for costs against the United States—even if it was subject to pay costs.

CONCLUSION.

It is submitted that the writ of error should be dismissed for lack of jurisdiction or the judgment of the District Court affirmed.

CLAUDE R. PORTER,
Assistant Attorney General.

W. C. HERRON,
Attorney.

APRIL, 1919.

APPENDIX.

THE OPINION OF JUDGE LEARNED HAND IN THE CASE OF UNITED STATES v. GIVANITTI.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA AGAINST ARTURO GIVANITTI, ET AL.

The defendants were indicted in Chicago under the Espionage Act and held for bail upon their arrest in the Southern District of New York upon warrants of removal. They furnished cash bail under the statute, which was deposited in the Registry of this Court. The case came on for trial and upon motion of the United States the indictments were dismissed against the two defendants here in question. Thereupon, upon motion to recover the bail, the clerk retained one per cent for "receiving, keeping and paying out money" in pursuance of the orders of this court (Revised Statutes section 828). This motion is for an order directing the clerk to pay the percentage so retained.

CHARLES RECHT for the motion.

RALPH W. HORNE Assistant U. S. Attorney for the clerk.

LEARNED HAND, *D. J.*: By section 974 of the Revised Statutes the court may in all cases of conviction charge costs against the defendant. By section 975, if an informer or plaintiff on a penal statute fails to get judgment he must pay costs to the defendant

unless he is an official, and by section 976 he must pay the marshal's and clerk's and attorney's fees of the defendant. It is significant that having provided by two sections for the payment in the case of informers no provision was made when the United States unsuccessfully prosecuted a defendant. I think that it is apparent that when the defendant is successful against the United States no costs or fees were intended to be enforced against it. This is especially true in view of the closing words of section 976, which provide for a case where the United States should pay the fees itself. There can be no doubt that the United States is not liable in any event.

On the other hand, it is equally clear that some one must pay the clerk for services precisely similar to those in a civil case. Section 976 provides for the payment of clerk's fees in actions qui tam, and there is no ground for distinction between such and strictly criminal prosecutions. Section 828, Revised Statutes, applies to criminal cases as well as section 824, *U. W.* v. *Kurtz*, 164 U. S. 49, and the clerk is as much entitled to withhold his fees as though he retained all his receipts instead of accounting for them and paying over all the surplus above his allowances. The theory of all fee offices is that the service earns the fee, nor is it an answer as to the clerk that the defendant in case of defeat has no recourse over. Obviously, such would be no answer if the opposite party in a civil action were insolvent, a somewhat analogous case. The clerk is therefore entitled to the fee.

The result is that the motion must be denied. This unfortunate consequence follows from the fact of the immunity of the United States, like all other sovereigns, from any of the risks of litigation. The

clerk, like the court, stands outside each and his rights, which are actual, should not be prejudiced because the result may be unjust between the parties. Whether the case may present an occasion for relief by application to the proper public authority is of course another matter, but it is outside the range of judicial inquiry.

July 19, 1918.

D. J.

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BERKMAN ET AL. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 865. Argued April 16, 1919.—Decided May 19, 1919.

A defendant under indictment who, pursuant to an order obtained on his own application, voluntarily deposits cash in the registry in lieu of bail, does so with full knowledge that under Rev. Stats., § 828, if applicable to such cases, one per cent. may be taxed as compensation to the clerk for receiving, keeping and paying out the money; and the contentions that the retention of such percentage, upon return of the deposit after his conviction, brings that section in conflict with the Fifth and Eighth Amendments, and Art. IV, § 2, of the Constitution, are frivolous, and will not support a direct writ of error under Jud. Code, § 238. P. 117.

Writ of error dismissed.

THE case is stated in the opinion.

Mr. Harry Weinberger for plaintiffs in error.

This practice of taking one per cent. deprives the bailor of plaintiffs in error of his property without due process of law, and takes his property without compensation. If we have the absolute right to give bail, defendants having been surrendered to answer the judgment of the court, the letter of the bond has been satisfied and the bailor has the absolute right to the return of his security, and any taking of part or all of the same by the court on any pretext (defendants having been surrendered to the court) is directly in violation of the Fifth Amendment.

It violates Art. IV, § 2, cl. 1, of the Constitution.

This right of giving cash bail comes from the common law. Petersdorff, Law of Bail, p. 7.

There can be no question that any impediment to the giving of bail works a hardship on defendants who may be

brought into court to face a criminal charge. The construction of the court puts additional burdens on certain classes. Nothing is charged by the Government for investigating the sufficiency of the real estate or the reliability of the bonding company, so if the trouble of the clerk is considered, it is less in cash bail cases, and no reason for the distinction or discrimination exists.

It violates the Eighth Amendment. "Excessive bail shall not be required."

Any impediment to the giving of bail is exactly the same as requiring excessive bail. It works to prevent a defendant being released on bail. If Congress could tax one per cent. on cash bail, it could tax it ninety per cent., or one hundred per cent., or tax similarly other kinds of bail, and so prevent it, thus circumventing the prohibition of this section. It was the intention of the Constitution to absolutely make sacred the right to bail, without any impediment and not too large bail.

Mr. Assistant Attorney General Porter, with whom *Mr. W. C. Herron* was on the brief, for the United States:

The plaintiffs in error are not entitled to come directly from the District Court to this court on the question of the construction of the statutes of the United States, or the decisions of the courts thereon, by a mere claim that the Constitution is involved. Judicial Code, § 238; *Rakes* v. *United States*, 212 U. S. 55, 58; *Lamar* v. *United States*, 240 U. S. 60, 65. They must, therefore, assume a construction of the statutes against them, and their claim must be that Congress has no power to enact that a defendant shall pay poundage to the clerk on money voluntarily deposited by him in lieu of bail. Such a claim is frivolous, the provisions of the Constitution referred to by plaintiffs in error having no application. It is not taking property without due process of law to compel a party to a cause to pay for services rendered at his voluntary request and

for his benefit. Costs may constitutionally be taxed. *Farmers' Insurance Co.* v. *Dobney*, 189 U. S. 301, 304; *Missouri, Kansas & Texas Ry. Co.* v. *Cade*, 233 U. S. 642, 651, 652; *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412, 432.

Nor is Article IV, § 1, or the Fourteenth Amendment, of the Constitution, any more applicable. Each applies only to state action. *United States* v. *Harris*, 106 U. S. 629, 643.

If it be assumed that the United States is prohibited by implication from discrimination between persons (see *United States* v. *Heinze*, 218 U. S. 532, 546), there is nothing arbitrary or grossly unfair in distinguishing between those defendants who give recognizance with surety and those who give cash bail, requiring the latter to pay a fee for the safe-keeping of the money. It is in no sense a discrimination. The service of holding the deposit is not performed for those who give a bond with surety. In the absence of statute, money can not be taken in lieu of bail, *United States* v. *Faw*, 1 Cranch, C. C. 486; *State* v. *Owens*, 112 Iowa, 403, 407, and cases cited. The statute which grants this privilege may constitutionally require that the person exercising it shall be subject to the burdens necessarily involved.

The points as to unreasonable search and seizure and excessive bail, if the plaintiffs in error are in any position to raise them on this application, need only be stated to demonstrate their lack of substance.

Mr. Justice McReynolds delivered the opinion of the court.

Section 828, U. S. Revised Statutes, which specifies the compensation to be taxed and allowed to clerks of District Courts, among other things provides: "For receiving, keeping, and paying out money, in pursuance

of any statute or order of court, one per centum on the amount so received, kept, and paid."

In each of the criminal causes entitled *The United States* v. *Emma Goldman* and *The United States* v. *Alexander Berkman*, some days subsequent to defendants' arrest (June, 1917), evidently upon applications in their behalf consented to by the District Attorney, the court below directed "That the sum of $25,000 Dollars, cash, be deposited in the Registry of this Court in lieu and place of bail for the appearance of the above-named defendant before the United States District Court for the Southern District of New York, in accordance with the provisions of the recognizance to be given by said defendant." Defendants were afterwards convicted and sentenced to imprisonment.

Upon motions duly presented the clerk was afterwards directed to pay to defendants' counsel funds deposited under the above orders, less costs. He retained one per centum as compensation and the court refused to declare this sum unlawfully withheld and direct its return. The matter is here by writ of error to the District Court.

It is now maintained that § 828 does not apply to criminal cases. Further, that if construed to be applicable where cash is deposited in lieu of bail for appearance of one charged with crime, it conflicts with the Federal Constitution, Fifth Amendment—"No person shall . . . be deprived of . . . liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"; also with Article IV, § 2—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" and with the Eighth Amendment—"Excessive bail shall not be required."

Our jurisdiction depends upon whether the case really and substantially involves the constitutionality of the section in question as construed and applied. Judicial

Code, § 238; *Rakes* v. *United States*, 212 U. S. 55, 58; *Lamar* v. *United States*, 240 U. S. 60, 65. And we deem it too clear for serious discussion that, as enforced below, the statute deprived plaintiffs in error of no right guaranteed by any of the constitutional provisions relied upon. With full knowledge they voluntarily asked to deposit money with the clerk and later requested that he be required to pay it out. Having thus obtained his services they now deny his claim for compensation. Obviously, nothing was taken from them without due process of law; their property was not taken for public use; they were not deprived of any privilege or immunity enjoyed by citizens of other States; and the record reveals no relation between the contested charge and any excessive bail. We think the suggested constitutional questions are wholly wanting in merit and too insubstantial to support our jurisdiction. *Brolan* v. *United States*, 236 U. S. 216, 218. The writ of error must be

Dismissed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS dissent.